



5/28/96

MEMORANDUM

SUBJECT: Interim Guidance on Administrative and Civil Judicial Enforcement Following Recent Amendments to the Equal Access to Justice Act

FROM: Robert Van Heuvelen, Director
Office of Regulatory Enforcement

TO: Regional Counsels, Regions I - X
Director, Office of Environmental Stewardship, Region I
Director, Division of Enforcement and Compliance Assurance, Region II
Director, Compliance Assurance & Enforcement Division, Region VI
Director, Office of Enforcement, Compliance & Environmental Justice, Region VIII
Regional Enforcement Coordinators, Regions I-X

A. INTRODUCTION

On March 29, 1996, President Clinton signed into law H.R. 3136, the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), P.L. 104-121, which had been added as an amendment to legislation raising the federal debt limit. ORE has been working closely with representatives of other OECA offices, a number of EPA regional offices, as well as the Department of Justice on implementation of this new law. SBREFA contains numerous provisions which will affect the manner in which the Federal government conducts enforcement against small businesses and small communities, and requires the Federal Government to implement a number of programs within one year of enactment. However, some provisions are effective immediately. In particular, sections 331 and 332 of the law amend the Equal Access to Justice Act¹ ("EAJA") to allow the awarding of attorneys fees to non-prevailing parties in an administrative or civil judicial enforcement action.

¹ 28 U.S.C. § 2412; 5 U.S.C. § 504. See also 40 C.F.R. § 17 (Implementation of the Equal Access to Justice Act in EPA Administrative Proceedings).

This memorandum is intended to provide interim guidance to reduce the Agency's risk of creating a cause of action in an administrative or judicial penalty action under SBREFA's amendments to the EAJA. This guidance does not address whether EAJA claims may apply to corrective action orders or cost recovery actions. These issues will be dealt with in a subsequent guidance being developed by the Office of Site Remediation Enforcement (OSRE).

Attached to this memorandum is a summary of some of the other provisions of SBREFA that are significant for enforcement purposes (see Attachment 3). As we work through these additional provisions, in conjunction with OECA's Office of Planning and Policy Analysis, we will provide further guidance and information as appropriate.

B. BACKGROUND ON CHANGES TO EQUAL ACCESS TO JUSTICE ACT

The revisions to EAJA made by SBREFA are a significant departure from the current state of EAJA law, which in general allows only a prevailing party to recover attorney's fees where the position of the government is not substantially justified. Sections 331 and 332 of SBREFA amend the EAJA to allow the award of attorney's fees to a non-prevailing party² in an administrative or civil enforcement action where the demand by the agency is substantially in excess of the decision of the adjudicative officer³ and is unreasonable when compared with such decision, under the facts and circumstances of the case. Demand is defined in both sections as the express demand of the United States or Agency which led to the adversary adjudication, but excludes a recitation of the maximum statutory penalty in the administrative or civil complaint or elsewhere when accompanied by an express demand for a lesser amount. Because section 504 of EAJA defines an adversary adjudication as an adjudication under section 554 of this title,⁴ this provision may apply to any administrative enforcement action required to

² For purposes of these subsections only, a non-prevailing party must be a small entity as defined by § 601 of Title 5. Small entity includes, but is not limited to, small non-profit organizations not dominant in their fields, small governmental jurisdictions up to 50,000 in population, and small businesses ranging up to 1,500 employees and up to \$25 million in annual receipts. Under the applicable Small Business Administration regulations, different criteria apply to different SIC categories. See Small Business Size Regulations, 61 Fed. Reg. 3,286 (January 31, 1996) (to be codified at 13 C.F.R. § 121).

³ Or, in the case of a civil judicial action subject to § 332, the demand by the United States is substantially in excess of the judgment finally obtained by the United States. The legislative history generated after passage of the legislation of SBREFA suggests that demand includes the value of any injunctive relief. See 142 Cong. Rec. S3242 (daily ed. March 29, 1996)(statement of Sen. Bond); 142 Cong. Rec. E571-573 (daily ed. April 19, 1996)(statement of Rep. Hyde). Please consult with ORE prior to relying on this.

⁴ See 5 U.S.C. § 504(b)(1)(C).

be brought using procedures subject to § 554 of the Administrative Procedure Act (APA),⁵ as well as to any civil judicial complaint filed on or after March 29, 1996.

SBREFA may allow a party which has been adjudged fully liable for violations of an environmental law to recover attorney's fees for its defense against the action if the court or adjudicating officer finds that the Agency's penalty demand was unreasonable and excessive, based on the record and the facts and circumstances of the case. As a result, in order to minimize the risk of a finding that the agency's penalty proposal is both unreasonable and excessive, agency practitioners should continue to make reasonable and appropriate proposals for specific penalties based upon the best evaluation of the facts at hand, the statutory penalty factors, and the applicable penalty policies. However, this new law creates additional exposure to EAJA awards as a result of Agency litigation, and concerns about possible awards may affect litigation decisions. With this in mind, Agency practitioners should consider the following options in preparing for litigation, drafting a complaint, and responding to EAJA claims.

C. ADMINISTRATIVE ENFORCEMENT

1. Maintain Consistency With Current Procedures

Implementation of SBREFA, and the changes to EAJA, are not incompatible with strong, fair and effective enforcement. As noted above, we are confident that our current practice of proposing specific penalties in administrative complaints, consistent with applicable EPA pleading penalty policies, will not result in significantly increased exposure to possible EAJA awards under SBREFA. In this regard, we urge the Agency's litigation teams and managers to craft complaints and develop litigation strategies with an awareness of the changes, but do not hesitate to initiate an action or to seek penalties for clear violations. Please continue to develop proposals for civil penalties that are reasonable and appropriate to the facts and circumstances of the case. In addition, it is highly advisable to include as standard language in any consent agreement a statement that each party agrees to bear its own costs and fees.

2. Options Where Ability to Pay and Other Factors Are Uncertain

As a general practice, we recommend that the litigation team identify and assess all information relevant to liability and the proper amount of a penalty prior to issuance of a complaint. If your preparations do not produce enough reliable information to develop a defensible, specific proposed penalty amount, you should consider one of the following three options:

⁵ 5 U.S.C. § 551 et. seq. Thus, formal administrative enforcement actions brought using the Consolidated Rules of Practice at 40 C.F.R. Part 22 may be subject to an EAJA claim.

a. *Issue a Pre-filing Show Cause or Settlement Letter Seeking Additional Information on Penalty Issues.*

Prior to filing a complaint, issue a pre-filing show cause or settlement letter in which the respondent is asked for any relevant information (including inability to pay) EPA should consider in determining an appropriate penalty. We advise practitioners to be cautious about including specific penalty proposals in these pre-filing letters. If, after such information is received, settlement does not occur, this information will assist in developing a more accurate, appropriate, and defensible penalty proposal for the complaint. Some Headquarters and Regional offices have adopted this practice, and it appears to work well. A model letter is attached for your consideration at Attachment 1.

b. *Reference Ability to Pay, Affirmative Defenses in Letter Accompanying the Complaint or in the Complaint Itself.*

In a cover letter accompanying a complaint, or in the complaint itself, state clearly that the penalty proposed may be adjusted if the respondent establishes *bona fide* issues of ability to pay, or other defenses relevant to the appropriate amount of the proposed penalty. Consider indicating in the complaint that the proposed penalty was developed based upon the best information available to the Agency at the time, and in consideration of the statutory factors, etc. Such indications may be relevant to the facts and circumstances language of SBREFA referenced above, and may work to mitigate the amount of any EAJA fee award. Model complaint language is attached as Attachment 2.

c. *Use Notice Pleading for the Penalty*

In cases where information relevant to proposing an appropriate penalty cannot be obtained before issuing the complaint and there are nonetheless reasons to proceed with the action, the litigation team should consider notice pleading – that is, pleading up to the statutory maximum amount for each violation alleged. This notice pleading approach would not eliminate the need to make a definite penalty proposal, but would postpone it until full information about the case, including all violations and respondent's defenses, are known, so that the Agency can produce better informed penalty proposals. Note, that if a respondent defaults by failure to answer, it will be necessary to develop a specific penalty proposal in the motion for default judgment, in order to comport with the current default procedures in 40 C.F.R. § 22.17(a), which assume a proposed penalty in the complaint. In any event, a specific penalty proposal and argument will still have to be developed for the purposes of a hearing. Sample language for notice pleading in administrative complaints is included in attachment 2.

3. Adjust the Penalty Proposal as Necessary

In the event of an EAJA claim, the Agency may be able to successfully argue that the assessed penalty should be compared to the Agency's best offer before an adjudication, rather than the penalty initially proposed in the complaint or in any pre-filing proposal. In all cases, attorneys should ensure that the respondent receives a written proposal containing a specific penalty amount based on the most current assessment of all the facts in the case before each adjudication occurs. This proposal should be made as far in advance of the adjudication as possible. Of course, whenever the Agency's understanding of the facts and legal issues in a case changes in such a way as to significantly impact the appropriate settlement penalty, the Agency should present the respondent with a written revised settlement offer.

D. CIVIL JUDICIAL ENFORCEMENT

When referring a civil judicial action to the Department of Justice (DOJ), any proposal made by EPA in a pre-filing negotiation must be disclosed to DOJ, including any proposal related to injunctive relief.⁶ Informing DOJ of any Agency proposal made prior to referral is essential to allow the Department to assess the potential for EAJA concerns in each case. In addition, where the SIC code for the defendant is known, or an analysis of the defendant's classification as a small entity has been made, please include that information in the litigation report forwarded to DOJ so that the Department will be on notice that the defendant may be eligible under EAJA for a possible fee award.

E. NEXT STEPS

Additional guidances and updates will follow as we move to implement SBREFA's provisions. In the meantime, if you have questions regarding SBREFA's impact on administrative or judicial enforcement, contact Robert Kinney (202-564-3712), Scott Garrison (202-564-4047) or David Hindin (202-564-6004). If you have questions about other aspects of SBREFA implementation, please contact Kate Perry, who is in OECA's Office of Planning and Policy Analysis (202-564-4059), or the appropriate ORE division.

Attachments (3)

cc: OECA Office Directors
ORE Division Directors
ORE Branch Chiefs
Deputy Assistant Attorneys General, Environment and Natural Resources Division, DOJ
Section Chiefs, Environmental Enforcement and Environmental Defense Sections, DOJ

⁶ See fn. 3, supra., regarding the relationship between demand under SBREFA and injunctive relief sought.

Attachment 1

EXAMPLE PRE-FILING LETTERS

Example 1

Dear _____:

This is to notify you that the U.S. Environmental Protection Agency is prepared to bring a civil administrative or judicial enforcement proceeding against [name] for violations of the [statute]. The complaint will allege that [name] has violated [section] of the [statute], and [regulation section], in that [name][describe violation]. The complaint will seek civil penalties for these violations.

Before filing the complaint, however, we are extending to you the opportunity to advise the Agency of any factors you believe that the Agency should consider before issuing the civil complaint. Relevant factors might include any evidence of reliance on compliance assistance provided by EPA or State agencies exercising delegated authority, misidentification of the proper party, or financial factors bearing on your ability to pay a civil penalty. Even if you are unaware of any mitigating or exculpatory factors, we are extending to you the opportunity to commence settlement discussions concerning the above-described violations.

It is our intention to file the civil administrative complaint two weeks from today, unless you first advise us of substantial reasons not to proceed as planned. Please direct your response to [name, address, phone number]. Thank you for your prompt attention to this matter.

Example 2

Dear _____:

The Environmental Protection Agency ("the Agency") has reason to believe that [name] may be in violation of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA" or "the Act") for selling and distributing a pesticide in violation of FIFRA § 12(a)(1)(C).

Under § 12(a)(1)(C) of FIFRA, it is unlawful for any person to distribute or sell any registered pesticide the composition of which differs at the time of its distribution or sale from its composition as described in the statement required in connection with its registration under section 3 of the Act. FIFRA § 2(gg) defines "To Distribute or Sell" as "to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver....".

The Agency has learned that [name], a registrant as defined in FIFRA §2(y), may be selling and/or distributing a registered pesticide, the composition of which differs from the composition as described in the confidential statement of formula submitted in connection with the product's registration.

Specifically, it has come to the Agency's attention that [product name] may have been formulated with [chemical] as an active ingredient, which was not registered with the Agency.

Therefore, the Environmental Protection Agency requests that your company submit to this office **within fifteen (15) business days of receipt of this letter** the following information regarding the above named products. Provide all records and documents relating to:

1. the dates of sale and/or distribution of the product,
2. the quantity (pounds or gallons) of products sold and/or distributed,
3. the locations of all sale and/or distribution sites,
4. all shipping records,
5. a copy of the full product labeling associated with the product,
6. any product packaging inserts or flyers used in the marketing aspects of the product,
7. any information that would indicate the source of the [chemical] as an active ingredient used in the production of the [pesticide product],
8. product chemistry and physical characteristic data supporting [pesticide product] as being similar or identical in composition or labeling to EPA Registration [number],
9. the process used to produce [chemical] as an active ingredient, and
10. your legal relationship to [affiliated corporation]

Following receipt of the requested information, the Agency may wish to meet with representatives of [name] to further discuss this matter and allow [name] additional opportunity to show cause why the Agency should not proceed with enforcement action.

Please direct your response to [name, address, phone number]. Thank you for your prompt attention to this matter.

Attachment 2

EXAMPLE NOTICE PLEADING LANGUAGE

Example 1:

CIVIL PENALTY

Section 14(a)(1) of FIFRA, 7 U.S.C. Section 1361(a)(1), authorizes the assessment of a civil penalty of not more than \$5,000 for each violation of FIFRA. The penalty assessed must reflect the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation.

Example 2:

CIVIL PENALTY

Section 16 of TSCA, 15 U.S.C. Section 2615, provides that any person who violates TSCA shall be liable for a civil penalty in an amount not to exceed \$25,000 for each violation, and that each day a violation continues shall constitute a separate violation of TSCA. The penalty assessed must reflect the nature, circumstances, extent and gravity of the violations, and, with respect to Respondent, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability and such other matters as justice may require.

Example 3:

Civil Penalty

Pursuant to Section 309(g)(2)(B) of the Clean Water Act, 33 U.S.C. § 1319(g)(2)(B), any person who has violated [insert appropriate statutory requirement of the Act] may be assessed a civil penalty by the Administrator that may not exceed \$10,000 per day for each day during which the violation continues, as long as the total amount of such a penalty does not exceed \$125,000. Therefore, Complainant requests that the Administrator, after consideration of the statutory assessment factors set forth at Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), assess a civil penalty against Respondent of up to \$10,000 per day for each day during which a violation(s) cited in this complaint continues.

Attachment 3

OTHER PROVISIONS OF SBREFA

SBREFA has a very broad reach, and will likely apply to a sizable percentage of the regulated community. It applies to all small entities, as that term is defined in 5 U.S.C. § 601, 15 U.S.C. § 632, and in SBA regulations codified at 13 C.F.R. Part 121. The universe of small entities is larger than the definition used in Section 507 of the Clean Air Act and OECA's Policy on Compliance Incentives for Small Businesses, both of which use a 100-employee limit. The SBA regulations define small by reference to *either* a company's number of employees (e.g., up to 1500, or greater) *or* a company's annual receipts (up to \$25,000,000), depending on the company's SIC code. The Act's definition of small entities also includes small governmental jurisdictions (smaller than 50,000 persons), and small organizations (e.g., non-profits), further expanding the reach of this Act. SBREFA requires the Agency to establish within a year of enactment a number of programs to benefit this segment of the community, some of which are summarized below.

1. Programs to Provide Advice and Guidance to a Small Entity -- Potential Evidentiary Impact

Section 313 of SBREFA requires each department and agency of the Federal government to establish a program to answer inquiries or give advice on interpreting and applying the law to specific sets of facts provided by a small entity. The legislative history indicates that this provision contemplated a range of mechanisms, many of which are already commonly used by the Agency to provide this kind of information, including the use of hotlines. However, the effect of this kind of guidance in an enforcement action may have been given greater weight by a provision specifying that [i]n any civil or administrative action against a small entity, guidance given by an agency applying the law to facts provided by the small entity may be considered evidence of the reasonableness . . . of any . . . fines, penalties or damages Given the informal nature of some forms of advice provided by different parts of the Agency (both Regional- and Headquarters-based), this has the potential to affect an enforcement case involving a violator who was provided with an inconsistent or erroneous interpretation of law as applied to the facts at issue. Whether this provision in fact imbues such advice with any greater evidentiary weight than already afforded under current law is an open question.

Nevertheless, this provision tends to highlight the issues which might arise in an action involving a party who had relied in good faith on erroneous advice or guidance provided by the Agency. However, because the Agency has in place a number of Headquarters and Regional-based mechanisms to provide advice and guidance to both large and small entities, this provision raises the potential for forum-shopping by a business. As such it will place a premium on the Agency's ability to ensure a reasonable consistency in interpretations when a business is provided with guidance that qualifies under this section. The program to be established under this section for responding to inquiries must be established within 1 year.

2. Oversight of EPA Enforcement Personnel by the SBA

Section 322, on Oversight of Regulatory Enforcement by the Small Business Administration, establishes regional boards chaired/run by the Small Business Administration, and gives new powers to

the Small Business Ombudsman. Specifically, the SBA ombudsman will provide a means to comment on the enforcement activity by EPA personnel which are conducting an enforcement action. An enforcement action includes an audit, on-site inspection, compliance assistance effort, or other enforcement related communication This does not appear to be limited to past and/or completed actions, but applies at any point in the enforcement process -- including while the case is in active litigation. There is also a provision made for a business which is currently being enforced against to make a confidential referral to the Inspector General regarding agency employees conducting compliance or enforcement activities The legislative history indicates that this is intended to address instances where Agency personnel are not following established policies, or where a policy is, in effect, allowing the Agency to enforce too zealously.

The SBA's regional boards are to report to the SBA Ombudsman on those excessive enforcement actions and recommend changes to enforcement policy or practice. The boards are also to rate the enforcement activities of agency personnel in reports to Congress. The legislative history likens this to a customer satisfaction index. The boards must be established by the SBA within 180 days after enactment.

3. Rights of Small Entities in Enforcement Actions

OECA's June 1995 *Interim Policy on Compliance Incentives for Small Businesses* is essentially codified by Section 323 of the Act (the legislative history indicates that the policy satisfies the section's requirements). Accordingly, while this section directs that each covered Federal agency to establish a program within one year to implement this section, EPA has already done this, although a final version of the *Interim Policy* will be issued shortly. In addition, the *Policy on Incentives for Self-Policing* (the Audit Policy) also appears to satisfy the criteria in this section of the new law.

4. Other Enforcement Impacts

Because the Act is still being analyzed, the full extent of its impact remains to be determined. However, the provisions of more immediate concern are, hopefully, noted above. There are other provisions which raise enforcement concerns -- such as the termination under Section 342 of ongoing and future enforcement actions brought under a rule for which a court has found that Regulatory Flexibility Act adherence was not sufficient. Many of the Act's other provisions affecting enforcement seem to be focused on changes to the rulemaking process, provisions for legislative veto of new rules, etc.